No. 06-304

In the Supreme Court of the United States

STEPHANIE TIPPIE,

Petitioner,

v.

SPACELABS MEDICAL, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

> Whether there is a compelling reason for the Court to grant the Petition, where the Eleventh Circuit's unpublished and fact-based decision affirming the District Court's grant of summary judgment was grounded in a rigorous analysis of the undisputed record and applied an articulation of the pretext standard under *McDonnell Douglas* framework recently cited with approval by this Court, and where the decision does not implicate any important federal question that has not been settled by this Court.

With due respect, Petitioner's purported articulation of the questions presented is inappropriate as it is prefaced by and premised on factual contentions that are unsupported by the record evidence. It also mischaracterizes the lower courts' holdings. Specifically, the Eleventh Circuit affirmed the District Court's order granting summary judgment where, contrary to the suggestion in the proposed question, the undisputed evidence established that the decision-maker did make a reasonable and particularized decision regarding Petitioner's relative qualifications for the positions she claims she should have been hired into following the elimination of her position due to a reorganization and reduction in force. Moreover, the Eleventh Circuit applied pretext standards recently cited with approval by this Court. Additionally, the Eleventh Circuit affirmed the District Court's grant of summary judgment on her race discrimination claim because she failed to present any evidence from which it could be found that the decision-maker considered her race in making the personnel decisions at issue.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Spacelabs Medical, Inc.'s parent corporation is Spacelabs Healthcare, Inc., which is traded on the London Stock Exchange. OSI Systems, Inc., is the only publicly held company that owns 10% or more of Spacelabs Healthcare.

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INTRODUCTION

This is not a case which warrants this Court's discretionary review. Petitioner seeks review of a fact-based and unpublished decision of the Eleventh Circuit that affirmed the District Court's summary judgment ruling in favor of Spacelabs Medical, Inc. ("Spacelabs"). Both the Eleventh Circuit and the District Court properly applied well-settled principles applicable to employment discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII") and 42 U.S.C. § 1981 to undisputed facts of record in a manner consistent with decisions of this Court and other Courts of Appeal.

More particularly, the Eleventh Circuit and the District Court properly held that summary judgment was appropriate in view of the uncontested factual record, which plainly demonstrated that Petitioner failed to establish that Spacelabs' legitimate, non-discriminatory reasons for not selecting her for a position she claims she should have received were pretextual. Indeed, the Eleventh Circuit applied pretext standards recently approved by this Court. Further, the Eleventh Circuit's decision does not give rise to any split among the circuits on the issue of the proper pretext standard or the application of the "honest belief" rule as Petitioner suggests. As the Eleventh Circuit held based on its review of the record, Spacelabs' legitimate, non-discriminatory reasons for selecting the candidate it felt was more qualified for the position at issue were not only honestly held, but were eminently reasonable.

Similarly, there is no pending question or circuit split on the issue of whether a claim based solely on national origin states a claim of race discrimination under § 1981. Rather, this Court has already conclusively answered that question in

the negative, and the Circuit Courts of Appeal have correctly and consistently followed this Court's guidance. Moreover, even if Petitioner's claim of national origin discrimination was cognizable as a claim of race discrimination under § 1981, it was properly dismissed for the same reasons as her other claims of discrimination -- Petitioner's inability to establish a *prima facie* case of discrimination and/or her failure to establish pretext.

Ultimately, Petitioner seeks nothing more than to have this Court independently review and weigh the evidence in this matter. As the Eleventh Circuit's decision both reflects and expressly states, it conducted a thorough review of the evidence in reaching the same conclusion as the District Court: that Petitioner did not satisfy her pretext burden. There is no reason for this Court to review what in the end amounts to a factbound argument concerning the evidentiary record below.

Accordingly, Petitioner has failed to meet her burden of establishing grounds warranting review and the petition should be denied.

COUNTERSTATEMENT OF THE CASE

Respondent Spacelabs Medical, Inc. ("Spacelabs") objects to Petitioner Stephanie Tippie's ("Tippie" or "Petitioner") Statement of the Case because it is factually incorrect, it contains irrelevant material, and it omits facts necessary to a consideration of the questions presented.

I. UNCONTROVERTED FACTUAL BACKGOUND.

A. Tippie's Employment in a Sales Position for Spacelabs.

Spacelabs is a medical equipment business that sells products to hospitals and physicians around the world. (Pet. App. at 12a). Petitioner, who is American, was employed by Spacelabs as a "Key Account Manager" in its Latin American Sales Division beginning in August of 1995. (*Id.*). In that position, her primary responsibility was sales of medical equipment in her designated territory, which for all but the first six months of her employment was limited to Central America and the Caribbean. (Pet. App. at 12a-13a).

B. Spacelabs was Acquired and Petitioner's Position was Eliminated.

In July of 2002, Instrumentarium Corporation acquired Spacelabs. (Pet. App. at 13a). Datex-Ohmeda, a subsidiary division of Instrumentarium, was a direct competitor of Spacelabs. As a result of the acquisition, Instrumentarium had redundant resources in its sales territories in Latin America. (*Id.*). Datex-Ohmeda's Regional Director for Latin America, Jukka Turtola ("Turtola"), was given responsibility for reorganizing and eliminating such redundancies, Turtola made the decision to retain Datex-Ohmeda's sales positions and to eliminate all of Spacelabs' Key Account Manager positions. (*Id.*).

C. The New Burdick Product Line Manager Position for Which Petitioner Was Not Selected.

At the time of the acquisition, there were four people employed as Key Account Managers by Spacelabs: Augusto

DeMelo, who was based in Brazil; Sylvia Hierro-Molino, who was based in Mexico; Facundo Carrillo, who was based in Argentina; and Petitioner, who was based in Ft. Lauderdale, Florida. (*Id.*). After making the decision to eliminate the Key Account Manager positions, Turtola considered these four Spacelabs' employees for newly created positions in the Latin America sales organization. (*Id.*). Turtola had two meetings with the Key Account Managers prior to deciding which, if any, would be offered new positions. (*Id.*). The first meeting was conducted at Datex-Ohmeda's Miami office and all of Spacelabs' Key Account Managers attended in person. (*Id.*). At that meeting, Turtola instructed the Key Account Managers to prepare distributor evaluations to assist him in evaluating Spacelabs' business. (*Id.*). During the second meeting, the Key Account Managers gave presentations regarding the distribution networks they used to sell Spacelabs' products, and Turtola met individually with each of the Key Account Managers. (Pet. App. at 14a). During the meetings, Turtola overheard Petitioner speaking Spanish and concluded, based on his personal observation, that she only had a basic ability to speak the language. (*Id.*).

After the elimination of the Key Account Manager positions, DeMelo was offered the newly created position of Datex-Ohmeda Area Manager for Brazil, as he was located in and already managed sales there. Hierro-Molino was hired by an independent distributor in Mexico, where she was located. (*Id.*). Turtola considered the two remaining Key Account Managers, Carrillo and Petitioner, for the new position of Spacelabs' Burdick Product Line Manager -- a position created to develop Spacelabs' Burdick Cardiology business in Latin America. (Pet. App. at 14a-15a). Turtola ultimately decided to offer the position to Carrillo based on his conclusion that Carrillo was the better qualified candidate. (*Id.*).

In an August 20, 2002 e-mail from Denisse Garcia, an assistant to Turtola, to Holly Borden, Spacelabs' Vice-President for Human Resources, Garcia gave a general description of the selection criteria being applied in the reorganization. These included: "Work History, Sales/Technical Knowledge, Work Ethics, Division's Needs and Requirements, Education, Knowledge of the Area they serviced (Latin America), Knowledge in the business areas required for the future division." (Pet. App. at 14a).

In a subsequent August 27, 2002 e-mail from Turtola to Borden, Turtola offered a more detailed and specific profile of the requirements needed for the Burdick position, noting that the person selected must have the following:

> [S]olid and proven management skills to be able [to] manage a large number of independent distributor companies in the entire Latin America market. The person needs to be able to further develop and build the distribution channel into an independent direction (on a non-exclusive basis) and make the product line grow. The person needs to have a solid understanding of the medical equipment markets overall in Latin America. The person should have a strong knowledge of cardiology and preferably a technical background. As the channel management of the product line will differ substantially from the patient monitoring and anesthesia machine channel to market management, it is extremely important the individual can work relatively independently towards the given goals. Excellent communication skills with the distributors' sales management and sales force are of vital importance to be successful in the job. Native in Spanish language it is an important asset in being able to communicate with the field sales force. Ability to

> communicate in Portuguese is an extra plus and obviously facilitates distributor management in the Brazilian territory.

(Pet. App. at 15a).

The e-mail from Turtola also offered a comparison of Carrillo and Petitioner against the above-stated requirements. Turtola's description of Carrillo was as follows:

> He has a wide knowledge of the Latin American medical equipment market. He has previously run a distributor organization in Argentina and knows what a distributor needs from the principal. He has an excellent combination of technical and clinical know how. He has proved to be able to work extremely well independently. His qualifications as a business manager are highly appreciated in the existing distribution channel. He is native in Spanish and fluent in Portuguese.

(*Id.*). Turtola also offered a description of Petitioner that stated:

> She is very experienced and high-caliber field sales person for medical equipment. She has clinical background which is an important asset in communicating with the end-customers, clinicians and nursing staff. Her strengths are in the area of field sales rather than distributor management and pro-active channel-to-market development. She doesn't have the technical/engineering perspective and understanding of the medical equipment which is elementary. She speaks some basic Spanish but is not

> native. She does not have any command of Portuguese language.

(Pet. App. at 16a-17a).

Based on the above comparison, Turtola decided that Carrillo was best qualified for the Burdick position. (Pet. App. at 17a). In particular, Turtola thought that Carrillo was a better candidate because he possessed firsthand knowledge of running a distributorship in Latin America, given that Carrillo previously worked at a distributor of cardiology equipment for twenty years -- fourteen of which he served as its general manager -- in Latin America. (*Id.*). Turtola did not review Petitioner's experience as comparable, given that it did not include working at or directly running a distributorship in Latin America. Instead, he felt that her primary strength was in sales. (*Id.*). Moreover, Turtola concluded that Carrillo had superior technical and clinical experience relevant to the Burdick position, since his prior experience as general manager for the cardiology equipment distributor included responsibility for technical product service and development, in addition to responsibility for managing product sales. (*Id.*).

Turtola also felt that Carrillo was better suited to the Burdick position from a technical/engineering perspective as he had an education and training in engineering, while Petitioner's education was in respiratory therapy and she came from a clinical background. (*Id.*). Finally, Turtola felt that Carrillo possessed better language abilities relevant to the requirement of the job because Carrillo spoke both Spanish and Portuguese -- the official languages of the countries the Burdick Manager would supervise. (Pet. App. at 17a, 30a). After hearing both candidates speak Spanish, Turtola concluded that Petitioner's Spanish was basic, while Carrillo,

as a native Spanish speaker, possessed a superior ability to communicate. (Pet. App. at 17a). Further, while Carrillo can speak Portuguese, Petitioner cannot. (Pet. App. at 18a n.3).

D. The Senior Product Manager Position for Which Petitioner Was Not Selected.

Petitioner was notified of her termination on August 30, 2002, which was effective September 27, 2002. (Pet. App. at 18a). In mid-September of 2002, Turtola spoke with Jorge Szmulewicz, an independent distributor who had previously worked with Datex-Ohmeda. Szmulewicz indicated to Turtola that he was planning on moving to the United States and was interested in working directly for Datex-Ohmeda. (Pet. App. at 18a, 33a n.12). Szmulewicz, had an electrical engineering degree and particular technical expertise working with ventilation and anesthesia devices. (Pet. App. at 18a). Based upon this specialized technical expertise and his experience, Turtola believed that Szmulewicz would be a valuable addition to Datex-Ohmeda in the position of "Senior Product Manager" for ventilation and anesthesia devices for Latin America. (*Id.*).

One of the requirements to hold such a position at Datex-Ohmeda is an engineering degree. Indeed, all of the employees in a product management role in Datex-Ohmeda's Latin American division were engineers, including the person directly reporting to the Senior Product Manager. (Pet. App. at 18a, 35a). Moreover, as part of his responsibilities in the Senior Product Manager position, Szmulewicz is called upon to prepare and give presentations completely devoted to how the company's products relate to technical concepts such as entropy, an engineering concept with applications related to measuring patient response to anesthesia delivery. (Pet. App.

at 18a, 36a). Unlike Szmulewicz, Petitioner is not an engineer. (Pet. App. at 18a). Further, Petitioner conceded she did not even know what the concept of entropy is. (*Id.*). Further, the Datex-Ohmeda Senior Product Manager is not a position responsible for sales, which are instead handled by the company's "Area Sales Managers" and not individuals like Szmulewicz. (Pet. App. at 1a, 35a). Because Petitioner did not have even the minimum qualifications for the Senior Product Manager position (i.e., an engineering degree), much less the specialized technical expertise Szmulewicz brought to it, Turtola did not consider her for the position.[1]

E. Proceedings And Disposition Below.

Following her termination, Petitioner instituted this action against Spacelabs alleging that it intentionally discriminated against her on the basis of her national origin and gender in

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[1] As the lower courts found, the "factual" assertions upon which Petitioner's arguments below and in her Petition are premised significantly mischaracterize the record evidence and/or are completely devoid of any record support. Such assertions include, but are not limited to, Petitioner's claims that Turtola stated that he failed to select her simply because she was "not native," that Turtola failed to conduct a careful consideration of the candidates, that there was any applicable company policy dictating preference for seniority, that the Senior Product Manager position was merely a sales position, and/or that Petitioner was "more than qualified" to occupy the position. Further, with regard to the Senior Product Manager position, the Eleventh Circuit correctly found that Petitioner failed to make out even a *prima facie* case of discrimination as she could not demonstrate that she met the minimum qualifications for the position, since it was undisputed that she did not have the requisite engineering degree nor sufficient technical knowledge to perform the position. (Pet. App. 8a-9a). Petitioner's arguments in her petition do not challenge that finding.

violation of Title VII and the Florida Civil Rights Act, § 760.10, Fla. Stat., and her race in violation of 42 U.S.C. § 1981. Specifically, Petitioner claimed that Spacelabs intentionally discriminated against her on the basis of her national origin, gender and race when it failed to select her for either the "Burdick Product Line Manager" or "Senior Product Manager" positions. (Pet. App. at 2a).

The District Court granted Spacelabs' motion for summary judgment, holding that Petitioner failed to make out even a *prima facie* case with regard to either position, because she did not establish she met either positions' minimum qualifications. (Pet. App. at 25a-26a, 32a-33a). Nevertheless, assuming *arguendo* that Petitioner had met her *prima facie* burden, the District Court further held she failed to demonstrate that Spacelabs' legitimate, non-discriminatory reasons for failing to hire her for the positions -- that the individuals hired into the positions were better qualified -- were a pretext for discrimination. (Pet. App. at 26a-32a). The District Court also dismissed Petitioner's § 1981 race discrimination claim, since it was premised entirely on her contention that she was not selected because she was American. The District Court held that it stated a claim of national origin discrimination, not race discrimination. (Pet. App. at 12a, n.1).

Petitioner appealed to the Eleventh Circuit, which affirmed the District Court's grant of summary judgment to Spacelabs. (Pet. App. at 1a-16a). The Eleventh Circuit disagreed with the District Court's holdings only in that it found Petitioner had presented enough evidence -- "though not strong" -- to meet her *prima facie* burden with regard to the Product Line Manager position. (Pet. App. at 6a). The Eleventh Circuit nevertheless agreed she had not met even her *prima facie* burden with regard to the Senior Product

Manager position given that she undisputedly lacked an engineering degree or the technical expertise required for that position. (Pet. App. at 6a, 8a-9a). The Eleventh Circuit further agreed with the District Court, based on its independent review of the record, that Petitioner was unable to show that Spacelabs' reasons for not selecting her were pretextual. The Eleventh Circuit held that she could not show her qualifications were so superior to the individual hired that no reasonable person could have selected the individual chosen, and that Spacelabs' reasons for selecting the other person would motive a reasonable employer. The Court also found, contrary to Petitioner's claims that Spacelabs' reasons, were consistent throughout the selection process. (Pet. App. at 8a). The Eleventh Circuit denied Plaintiffs' subsequent petition for rehearing *en banc*. (Pet. App. at 38a).

REASONS FOR DENYING THE PETITION

The decisions below are unpublished, fact-based determinations in which the lower courts applied proper legal standards that neither conflict with a decision of this Court nor of any Court of Appeals. Moreover, the record in this case does not implicate a federal question that either has not been or needs to be decided by this Court. Accordingly, Petitioner has not carried her burden of demonstrating a "compelling reason" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. APPLYING STANDARDS RECENTLY CITED WITH APPROVAL BY THIS COURT AND CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS, THE ELEVENTH CIRCUIT PROPERLY AFFIRMED THE FINDING THAT PETITIONER FAILED TO DEMONSTRATE THAT THE LEGITIMATE, NON-DISCRIMINATORY REASONS ARTICULATED BY SPACELABS FOR NOT SELECTING HER FOR THE BURDICK PRODUCT MANAGER POSITION WERE PRETEXTUAL.

The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 153 (2002). In order to survive summary judgment where the employer has articulated legitimate, non-discriminatory reasons for the employment decision at issue, the plaintiff must present evidence sufficient to demonstrate "'that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.* at 143 (*quoting Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)); *see also St. Mary's Honor Center v. Hicks*, 509 U.S. 507-508 (1993).

Spacelabs met its burden of articulating legitimate, non-discriminatory reasons for selecting Carrillo over Petitioner for the Burdick Product Manager position in Latin America.[2]

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[2] As previously noted, nothing in the petition raises a challenge to the Eleventh Circuit's holding that Petitioner failed even to meet her *prima facie* burden of demonstrating she met the minimum qualifications for the other position referenced in her complaint -- the Senior Product Manager position. Accordingly, Petitioner has waived any argument regarding dismissal of her claims based on

Specifically, Spacelabs considered the person it hired the better candidate for that position because: (1) he had previously worked as a general manager of a distributor of cardiology equipment in Latin America, where he was responsible for technical product service and development in addition to sales; (2) he was educated and trained in engineering, while Petitioner's education came from a clinical background in respiratory therapy; and (3) he had superior language skills because his native language was Spanish and he spoke Portuguese, which Petitioner does not. (Pet. App. at 27a). To survive summary judgment, Petitioner was thus required to adduce sufficient evidence to give rise to an inference that Spacelabs' stated reasons were false and that the true reason she was not selected was intentional discrimination. *See Reeves, supra.*

In rejecting the Petitioner's attempts to show pretext through comparative qualifications, the Eleventh Circuit applied a pretext standard recently approved by the Court in *Ash v. Tyson Foods*, 126 S. Ct. 1195 (2006); (Pet. App. at 8a n.2). In *Ash*, the Court noted that a plaintiff in a comparative qualifications case such as this may be able to raise an inference of pretext from superior qualifications in certain circumstances. Without defining a precise standard, the Court cited with approval various articulations of the proper standard by the lower courts. *Id.* at 1197-98 (*citing Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied* 126 S. Ct. 478 (2005) (noting that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question"), *Raad v. Fairbanks North Star Borough*

Spacelabs' failure to hire her for that position.

School Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (holding that qualifications evidence, standing alone, may establish pretext where the plaintiff's qualifications are "clearly superior" to those of the selected applicant;" *AKA v. Washington Hospital Center*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) (concluding that the factfinder may infer pretext if "a reasonable employer would have found the plaintiff to be significantly better qualified for the job")).

Citing *Ash,* and applying the *Cooper* standard quoted with approval by this Court, the Eleventh Circuit found that Petitioner was unable to show her qualifications were so much better than the individual selected that no reasonable person could have chosen that individual for the position over her. (Pet. App. at 8a). The Eleventh Circuit further found that Petitioner's other attempts to show pretext -- by asserting the decision-making process was unworthy of credence and contained shifting justifications for the adverse employment action -- also failed as "Spacelabs' reasons for selecting Carrillo would motivate a reasonable employer and were consistent throughout the entire process." (Pet. App. at 8a) As the District Court explicitly stated:

> [T]he Court finds that requiring experience managing distributors of cardiology equipment in Latin America to be a reasonable motivation in filling the Burdick position, since the position was created, in part, to develop distribution channels for cardiology equipment in Latin America . . . . the Court finds requiring technical experience and an education in engineering to be reasonable motivations for filling the Burdick position . . . the Court finds that requiring the ability to speak Spanish and Portuguese are reasonable motivations for filling the Burdick position, since these languages are the official languages of the

> countries over which the Burdick Manager would supervise.

(Pet. App. at 28a-30a). The District Court found, and the Eleventh Circuit affirmed, "there is no evidence that these have ever changed." (Pet. App. at 31a n.11).

Petitioner now claims that review of the Eleventh Circuit's decision is warranted to resolve a conflict between the circuits concerning applications of the honest belief rule in the summary judgment context. The honest belief rule provides that "so long as the employer honestly believed in the proffered reason, an employee cannot prove pretext even if the employer's reason in the end is shown to be mistaken, foolish, trivial, or baseless." *See Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 677-78 (7th Cir. 1997). While most circuits have strictly applied the honest belief rule, finding that "an employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct," *see Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1363 n. 3 (11th Cir. 1999), *Kariotis*, 131 F.3d at 677 ("arguing about the accuracy of the employer's assessment is a distraction [internal citation omitted] because the question is not whether the employer's reasons for a decision are 'right but whether the employer's description of its reasons is honest'") (quoting source omitted), the Sixth Circuit has suggested that employers seeking to avail themselves of the honest belief rule should be required to show that their decision was "reasonably based on particularized facts." *See Smith v. Chrysler Corporation*, 155 F.3d 799, 807 (6th Cir. 1998).

Here, Petitioner's claims were not barred by an application of the honest belief rule. As the District Court

found and the Eleventh Circuit affirmed, the Petitioner did not offer any evidence that the proffered reasons that Spacelabs chose to hire Carrillo instead of the Petitioner -- his experience in working for and running a distributor of cardiology products in Latin America, his greater technical training and experience and his superior language abilities -- were mistaken, foolish, trivial or baseless. This is not a case where Spacelabs had an honest, but inaccurate, belief about any of these criteria. To the contrary, as the District Court found, there was unrebutted evidence that Carrillo had greater experience working for and running a cardiology equipment distributor in Latin America, that he had greater technical training and had greater language skills because he spoke both Spanish and Portuguese. Furthermore, Tippie offered no evidence that her qualifications were comparable, much less superior. Consequently, the honest belief rule, and thus any question regarding the proper application of that rule, are irrelevant.

Further, even though the Eleventh Circuit's decision did not rest on an application of the honest belief rule, both its decision and that of the District Court would satisfy the test which Petitioner suggests should be adopted under that rule. Specifically, Petitioner contends that an employer should only be permitted to rely on the honestly held belief rule where its is reasonably based on particularized facts. (Pet. Br. at 25 (*citing Smith, supra*)). Petitioner's argument utterly ignores that both the Eleventh Circuit and the District Court correctly found that Spacelabs' hiring decision for the Burdick Product Manager position was reasonable and based on particularized facts. In particular, both the Eleventh Circuit and the District Court not only found that Petitioner failed to present any evidence giving rise to an inference that the decision-maker did not honestly believe the reasons underlying his determination that Petitioner was not the best qualified

candidate, but also expressly found that the reasons were particularized and reasonable. (Pet. App. at 8a, 28a-32a).

Indeed, Petitioner's contention that Spacelabs failed to make a reasonable or particularized determination is undercut by the undisputed record evidence upon which the lower courts' decisions were based. As she did before the lower courts, Petitioner grossly misstates the record in her attempts to support her arguments. She misleads the Court by suggesting that the record evidence supports a finding that the decision-maker failed to look at or consider Petitioner's background and that his decision was not well informed. (Pet. Br. at 24). In reviewing the actual record, the courts below properly rejected this contention, finding that the decision-maker's e-mail describing his selection decision demonstrates that he obviously did look into and consider Petitioner's background as shown by his particularized discussion of her qualifications, including but not limited to her educational background (in respiratory therapy) and her experience (clinical). (Pet. App. at 16a-17a). Further, while Petitioner argues that the decision-maker should have noticed in her personnel file a reference to the fact that she was trained in Spanish translation 30 years earlier, that fact does not support a finding that the decision-maker failed to make a particularized determination of the comparative Spanish language skills of Petitioner and the person he selected after having heard them both speak Spanish.[3]

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[3] Underlying Petitioner's arguments are numerous other mischaracterizations of the record, including in regard to her comparative experience and language skills, that the lower courts also considered and properly rejected. For example, Petitioner claims that the decision-maker admitted she had the same experience "running distributor networks." (Pet. Br. at 16). As the decision-maker noted, however, there is a significant distinction

Petitioner's argument regarding the honest belief rule is thus nothing more than a red-herring. The Eleventh Circuit and District Court's decisions were premised on the well-settled principle that in cases such as this, where pretext arguments are ultimately premised on comparative qualifications, "the court must respect the employer's unfettered discretion to choose among qualified candidates ... (and not to act as a super personnel department that second guesses employers' business judgments)." *See Byrnie v. Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) (citation omitted); *Rathbun v. Autozone*, 361 F.3d 62, 74 (1st Cir. 2004) (same); *Scott v. University of Mississippi*, 148 F.3d 493, 509 (5th Cir. 1998) (same); *Peters v. Lieuallen*, 746 F.2d 1390, 1393 (9th Cir. 1984) (same); *Millbrook v. IBP*,

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between (1) running distributor networks as a manufacturing company's sales representative and (2) working directly for and running a distributor in Latin America as a general manager. While Petitioner had comparable experience in the first category, it is undisputed she had none in the second. In contrast, the individual selected for the position undisputedly had more than 14 years of such experience working in Latin American for a distributor of cardiology equipment, in addition to having a formal education and background in engineering that Petitioner also undisputedly lacked. (Pet. App. at 29a, 33a). Further, while Petitioner notes that she spoke Portunal (allegedly a hybrid dialect consisting primarily of Spanish and a few words in Portuguese), it is undisputed that she did not actually speak Portuguese while the person selected did. As it was entirely reasonable for Spacelabs to select someone who was able to speak the official language (whether fluently or conversationally) -- rather than Petitioner who could merely speak a hybrid consisting of only a few words of the language -- the lower courts properly rejected Petitioner's pretext argument premised on her comparative language skills.

280 F.3d 1169, 1181 (7th Cir. 2002), *cert. denied* 537 U.S. 884 (2002) (same); *Bullington v. United Air Lines*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) (same); *Fishbach v. D.C. Dept. of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (same). Petitioner ignores this because she is unable to directly attack the lower courts' findings that she utterly failed to demonstrate that her qualifications were superior. Under *Ash* and the decisions of every circuit court that has addressed pretext in the context of comparative qualifications, that is simply not enough to establish pretext. Instead, Petitioner was also required to adduce evidence establishing that her qualifications were not only objectively superior, but significantly so. *See Ash*, *supra*. Because Petitioner failed to present evidence that she was as qualified as the individual selected, much less that her the qualifications were so superior as to give rise to an inference of pretext, the Eleventh Circuit properly affirmed the District Court's dismissal of her discrimination claims. (Pet. App. at 8a, 30a-32a).

II. THE ELEVENTH CIRCUIT PROPERLY HELD, AS THIS COURT HAS PREVIOUSLY FOUND, THAT A CLAIM BASED PURELY ON NATIONAL ORIGIN IS NOT COGNIZABLE UNDER § 1981.

Petitioner frivolously argues that the Court should exercise review to determine whether a claim based exclusively on national origin discrimination necessarily states a claim of race discrimination under § 1981. Petitioner's argument is frivolous because it ignores that this Court has already answered that question, correctly finding that it does not. *See St. Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987). Indeed, the Court in *St. Francis* expressly noted that in order to state a cognizable claim under § 1981, a plaintiff must do more than allege she was discriminated against based solely

on the place or nation of her origin. She must instead show at a minimum that she was discriminated against based on her ancestry or ethnic characteristics. *Id.* ("If respondent on remand can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab, **rather than solely on the place or nation of his origin**, or his religion, he will have made out a case under § 1981.") (emphasis added).

Contrary to Petitioner's suggestion, the Courts of Appeal have consistently and uniformly followed this Court's guidance in holding that claims which implicate discrimination on the basis of ancestry or ethnic characteristics are cognizable under § 1981, while claims premised exclusively on an individual's birthplace do not fall within § 1981's coverage. In particular, the courts have not widely assumed that claims of national origin discrimination and claims of race are mutually exclusive as Petitioner claims. Rather, as the cases Petitioner cites illustrate, the courts have merely consistently required that claims of national origin discrimination be tied to evidence of discrimination on the basis of ancestry or ethnicity to state a cognizable claim of race discrimination under § 1981. *See Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1387 n.7 (10th Cir. 1991) (noting that § 1981 does not prohibit national origin discrimination per se, but that it covered claims of discrimination based on the plaintiff's Iranian descent because such claims implicated plaintiff's ancestry and/or ethnic characteristics); *Bisciglia v. Kenosha Unified School Dist. No. 1*, 45 F.3d 223, 230 (7th Cir. 1995) (finding claim of discrimination based on Italian descent actionable because at the time § 1981 was adopted, "Italians" constituted group of people with similar characteristics and thus an identifiable "race" that Congress intended to protect) (citations omitted); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184, 1188 (2d Cir.

1987) (finding § 1981 covered allegation of discrimination based on Puerto Rican descent given implications of discrimination on the basis of ancestry or ethnic characteristics); *Magana v. Commonwealth of Northern Mariana Islands*, 107 F.3d 1436, 1446-47 (9th Cir. 1997) (finding § 1981 coverage given that plaintiff alleged discrimination because of race based on being Filipino and being treated less favorably than Caucasians and noting claims were thus not based solely on plaintiff being from the Philippines).

Consistent with this Court's holding in *St. Francis* and the decisions of the Courts of Appeal that have uniformly followed that holding, the Eleventh Circuit upheld the dismissal of Petitioner's § 1981 claim because it was premised entirely on her national origin. While some claims asserting national origin discrimination may be closely tied to and thus necessarily implicate issues of ancestry and ethnicity that would support a claim of discrimination on the basis of race under § 1981, Petitioner's claim that she was discriminated against because she was American does not.[4] Being American does not implicate inclusion in any particular "ethnically nor physiognomically distinctive sub-group" and there is nothing

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[4] In her charge of discrimination filed with the Equal Employment Opportunity Commission, Petitioner notably failed to identify race as a basis upon which she believed she was discriminated against. When asked at her deposition to identify the grounds upon which she believed she was discriminated against, she responded by stating, "Gender, nationality, religion, age." Further, when later specifically questioned at her deposition about the basis of the § 1981 race claim in her complaint, she testified that to the extent she believed she was discriminated against on the basis of her race at all, it was because she was "American." She thus did not allege that it was because of her race, which she identified as Caucasian.

in the history or context of § 1981 that would suggest that Congress considered "Americans" to be a racial classification to which the statute was addressed. *See St. Francis*, 481 U.S. at 611-612 (noting historical definitions of race at its broadest tied to common ancestry or ethnic characteristics). Petitioner's status as an American is related to her national origin, not her race, and her claims under § 1981 that were premised on her being American and thus "not native" were properly dismissed as they did not state a claim under § 1981. Moreover, as the Eleventh Circuit found based on the record, there is no support for Petitioner's contention that the decision-maker expressed a preference for a native person of Argentina.[5] (Pet. App. at 4a (noting that, "Taken in context, [the decision-maker's] use of the phrase 'not native' was a manner of describing [Petitioner's] Spanish language abilities, not her national origin.")).

Finally, even if Petitioner's claim of national origin discrimination was cognizable under § 1981, it was nevertheless properly dismissed. This follows from the fact that claims under § 1981 are subject to the same burden shifting analysis as claims under Title VII. *See Stallworth v. Shuler*, 777 F.2d 1431, 1433 (11th Cir. 1985) (noting that § 1981 claims are evaluated under the same *McDonnell Douglas* standards applicable to Title VII claims). Accordingly, even if cognizable, Petitioner's § 1981 claims

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[5] Notably, Argentina's population is primarily ethnically Caucasian and largely of European ancestry. *See The World Fact Book 2006*, Central Intelligence Agency, Office of Public Affairs, 2006. Petitioner failed to adduce any evidence to suggest that the decision-maker considered her ethnicity or ancestry, and she also failed to adduce evidence establishing her ethnicity or ancestry were different from the individuals selected for the positions she claims she should have received.

fail for the same reasons as her Title VII claims -- her inability to establish a *prima facie* case of discrimination given her lack of minimum qualifications for the positions at issue, and/or her failure to establish that Spacelabs' legitimate, non-discriminatory reasons for failing to hire her for those positions were pretextual. Petitioner thus fails to state a compelling reason to grant review on the issue of the dismissal of her claims of race discrimination under § 1981.

CONCLUSION

For all the foregoing reasons, Respondent respectfully requests the Petition for Certiorari be denied.

Respectfully submitted this 13th day of November, 2006.

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